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No. 04-430

Supreme Court, U.S.
FILED
DEC 2 - 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

LIFESTAR AMBULANCE SERVICE, INC., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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December 2, 2004

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REPLY BRIEF FOR PETITIONERS

Petitioners do not "challenge regulations implementing a fee schedule." (Br. for the Federal Respondents in Opp., at 1). Respondents serve up this idea in the very first sentence of their Statement of the Case to suggest this case is a garden variety administrative squabble to be considered and resolved administratively. But the "channeling" requirement which Respondents claim requires this case to go through the administrative process comes from a statute that by its very terms does not limit mandamus jurisdiction. Pet. App. 48a (42 U.S.C. § 405(g), (h)). By grafting a channeling requirement on all cases arising under the Medicare Act where a plaintiff seeks mandamus, the Eleventh Circuit opinion runs contrary to every circuit that has considered the issue. Mandamus jurisdiction is perfect and necessary for Petitioners' challenge to Respondents' failure to comply with the law, even where that law is part of the Medicare Act.

Congress directed that Respondents establish a fee schedule for the payment of ambulance suppliers who furnished services to Medicare beneficiaries. Congress further mandated that this fee schedule "shall apply to services furnished on or after January 1, 2000." Pet. App. 58a (Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4531(b)(3) ("BBA")). In the Benefits Improvement and Protection Act of 2000 ("BIPA"), Congress directed that in addition to the changes mandated by the BBA, these suppliers should also receive "full payment of any national mileage rate" under the fee schedule for in-county miles. Pet. App. 63a (BIPA, Publ. L. No. 106-554, § 423(b)(1) (codified at 42 U.S.C. § 1395m(1)(2)(E))). Congress specifically directed that this amendment "shall apply to services furnished on or after July 1, 2001." Pet.

App. 63a (*Id.* at § 423(b)(2)). Respondents adopted regulations establishing a fee schedule that applies to services furnished on or after April 1, 2002.

No fee schedule exists for the relevant time frame. Petitioners challenge Respondents' failure to adopt a regulation that complies with the clear Congressional directive. That is an omission. To remedy this failure to act, Respondents must be ordered to comply with the law. Mandamus jurisdiction provides an Article III court with the power to order a federal official to comply with the law. Pet. App. 46a (28 U.S.C. § 1361). In fact, mandamus is the *only* remedy available to force compliance with the law. When the district court ordered Respondents to adopt a fee schedule that complied with the BBA, it did not disturb the existing regulations applying to services furnished after April 1, 2002. An awareness that this case is not simply a challenge to existing regulations helps to highlight the important jurisdictional issue at hand.

Petitioners do not simply argue that the administrative process would be ineffectual and unable to force Respondents to comply with the law. That is not the point. No entity, not even an Article III court has the power to grant the specific relief Petitioners request except through mandamus. *See Nat'l Wildlife Fed'n v. United States,* 626 F.2d 917, 918 n.1 (D.C. Cir. 1980) ("An action purportedly requesting a mandatory injunction against a federal official is properly analyzed as one requesting mandamus.").

CONCLUSION

Petitioners respectfully ask that this case be set for argument so that the Court may address the significant jurisdictional issue regarding the relationship between 42 U.S.C. § 405(h) and 28 U.S.C. § 1361 and thereby resolve the conflict between the Eleventh Circuit and the other nine circuits that have addressed this issue by holding that § 405(h) does not bar consideration of whether mandamus jurisdiction exists.

Respectfully submitted,

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